

Pham (Migration) [2020] AATA 5419 (6 November 2020)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mrs Thi Thanh Van Pham

CASE NUMBER: 1830912

HOME AFFAIRS REFERENCE(S): BCC2017/3198336

MEMBER: Roger Maguire

DATE: 6 November 2020

PLACE OF DECISION: Brisbane

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211 of Schedule 2 to the Regulations
- cl.820.221 of Schedule 2 to the Regulations

Statement made on 06 November 2020 at 10:21am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship – validly married – financial, household and social aspects of relationship – nature of commitment – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F(2), 65, 360(2)(a)
Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cls 820.211(2)(a), 820.221(1)(a)

CASE

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 4 September 2017 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied that the applicant was the spouse of the sponsor.
4. The Tribunal has considered the material before it, and considers that it should decide the review in the applicant's favour on the basis of that material without proceeding to a hearing as provided for in s. 360(2)(a) of the Act.
5. The applicant was represented in relation to the review by her registered migration agent.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant was the spouse of the sponsor as at the date of the visa application, and the date of this decision.

Whether the parties are in a spouse or de facto relationship

8. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

10. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The Tribunal has before it Queensland Marriage Certificate_ Registration Number 2017/12730 evidencing a marriage between the applicant and sponsor on 19 August 2017. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

11. In reaching its decision, the Tribunal has had regard for the following material provided by the applicant:
- (a) Statutory declarations sworn by Mr Abel dated 15.10.2019
 - (b) The marriage certificate
 - (c) The copy of Mr Abel Gregory George's Will dated 21.01.2019
 - (d) The copy of Mrs Thi Thanh Van Pham's Will dated 21.01.2019
 - (e) The copy of form 888 sworn by Mr Glenn Michael dated 17.08.2019
 - (f) The copy of form 888 sworn by Mr Graham Edward Coops dated 19.09.2019
 - (g) The copy of form 888 sworn by Mr Geoffrey Paul Lassig dated 21.11.2019
 - (h) The copy of form 888 sworn by Mr Karl William Maurer dated 15.11.2019
 - (i) The copies of Mrs Pham & Mr Abel's expired Driver Licence
 - (j) The copies of Mrs Pham's Driver Licence and passport
 - (k) The copies of Mr Abel's Driver Licence and passport
 - (l) The copies of Mr Abel's Superannuation account beneficiaries to Mrs Pham from Sunsuper
 - (m) The copy of the invitation card jointly name Mrs Pham & Mr Abel
 - (n) Insurance certificate listed under Mrs Pham and Mr Abel's name
 - (o) The copies of Suncorp bank statement jointly account from 2017 to 2019
 - (p) Money transfer via Third-party "Bao Bao" from 2017 to 2019
 - (q) The copies of Mrs Pham & Mr Abel's itineraries from 2017 to 2019
 - (r) The copies of the tax invoice under the joint name from 2017 to 2019 issued by third parties
 - (s) The copies of the general tenancy agreement (Form 18a, form 2, form 9) and letters from third parties from 2018 to 2019 regarding rental agreement
 - (t) Letter from Mrs Pham's employer dated 18 November 2019

- (u) The copies of all photos between the visa applicant and the sponsor socialise with their families and friends from 2017 to 2019
- (v) The copy of Mrs Pham's Tax Return 2018 from ATO
- (w) The copy of letters from Department of Health and Department of Transport and Main Roads to Mrs Pham from 2018 to 2019
- (x) Mrs Pham's Mental Health Plan issued on 7 December 2019.

12. The Tribunal has had regard for each matter in r.1.15A(3)(a), (b), (c) and (d), and any other circumstances of the relationship under r.1.15A(2) as follows.

13. Financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.

14. In considering the financial aspects of the relationship, the Tribunal has considered the material listed above with particular regard to bank statements, wills, superannuation arrangements vehicle arrangements and tenancy arrangements. The Tribunal notes that the sponsor began sending significant sums of money to the applicants bank account on 8 May 2017, and sent sums at least monthly thereafter. The Tribunal notes that the sponsor sent sums totalling in excess of \$60,000 for the support of the applicant's family in Vietnam over a period of some 15 months beginning 8 May 2017. The Tribunal gives weight to this. The Tribunal has also had regard to the evidence of the sponsor as to the financial aspects of the relationship, and the Tribunal accepts this evidence.

15. Nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.

16. The Tribunal broadly accepts the evidence as to the nature of the household are set out in the sponsor statutory declaration dated 15 October 2019, and the financial support which the parties have given to her son. The Tribunal accepts that the parties were legally married as at the date of the visa application, and have not lived separately or apart since that time, and that they undertake household activities together.

17. Social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.

18. The Tribunal has had regard for the various statutory declarations filed by friends and colleagues of the parties, and accepts that the parties do represent themselves to other people as being married to each other, and that their friends do not appear to hold any doubts as to the genuineness of the relationship. It is clear that the parties undertake all social activities jointly.

19. Nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.

20. The parties have now been legally married for over three years, and have lived together throughout that time. As is becoming increasingly common, the parties initially met in 2016 online, and developed a relationship via texting and video on a daily basis. They met in

March 2017 when the sponsor attended a friend's wedding. The applicant gave the sponsor a great deal of emotional support during his hospitalisation in December 2018, and cared for him during his convalescence. The sponsor has spoken persuasively at length and with some degree of passion as to the care she provided for him during this period, and acknowledges how fortunate he is to have her as his wife. The applicant has encouraged the sponsor to eat healthy food, and quit sugar, drink less, and exercise more because she wants him to live as long as possible considering their age difference. It is clear from the sponsor's statutory declaration that he has given great support to the applicant, and has grown close to and fond of her 17-year-old son.

21. Having regard for the totality of the evidence in this review, the Tribunal is satisfied that as at the date of the visa application, and as at the date of this decision, the parties are and continue to be married to each other in a marriage that is valid for the purposes of the Act; that they have a mutual commitment to a shared life as husband-and-wife to the exclusion of all others; and that the relationship when there is genuine and continuing; and that they lived together.
22. The Tribunal is therefore satisfied that as at the date of the visa application, and the date of this decision the parties are in a married relationship for the purposes of section 5 F (2) of the Act, and that the applicant is the spouse of the sponsor.
23. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
24. Therefore the applicant meets cl.820.211(2)(a) and cl.820.221(1)(a).
25. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

26. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl.820.211(2)(a) of Schedule 2 to the Regulations
 - cl.820.221(1)(a) of Schedule 2 to the Regulations

Roger Maguire
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).